

NOT FOR PUBLICATION - For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Crim. No. 2001-044
)	
CECIL FREEMAN,)	
)	
Defendant.)	
)	

APPEARANCES :

Hugh P. Mabe, Esq.
Asst. U.S. Attorney
St. Thomas, U.S.V.I.
For the plaintiff,

Andrew Capdeville, Esq.
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

This matter is before the Court on the defendant's motion to dismiss the indictment due to a violation of his rights under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. More particularly, the defendant asserts that, because the United States did not file the information against him until after the time for such filing expired under the Speedy Trial Act, the Court must dismiss the information. The Court held a hearing on November 24, 2001. For the reasons stated below, the defendant's motion will be granted.

The Speedy Trial Act requires, in relevant part, that

[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161(b). If, in the case where the defendant is charged by complaint, an information or indictment is not filed within thirty nonexcludable days, the court must dismiss the charges contained in the complaint. *Id.* § 3162(a)(1).

The speedy trial clock began to tick in this case on March 24, 2000, the date the defendant was charged by complaint with carjacking and use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 2119 and 924(c).¹ See 18 U.S.C. § 3161(b). The last day for filing formal charges was April 23, 2000, which fell on a Sunday, making the day by which formal charges needed to be filed Monday, April 24, 2000. See *United States v. Fields*, 39 F.3d 439, 441 (3d Cir. 1994). On that day, the United States filed a motion for extension of time, causing that day to be excluded from calculating the time and tolling the period for filing formal charges. See *id.* § 3161(h)(1)(F); see also *United States v. Lattany*, 982 F.2d 866, 872 (3d Cir. 1992) ("In calculating includable time, both the date on which an event

¹ The charge of use of a firearm during a crime of violence was incorporated into the complaint by reference to the attached affidavit of complainant. (See Aff. of Curtis A. Griffin, Detective Sergeant, V.I. Police Dept., at 2 (attached to Criminal Complaint).)

occurs or a motion is filed and the date on which the court disposes of a motion are excluded."). In the motion, the United States asserted that the defendant did not object to extending the date for filing formal charges to May 25, 2000, and further explained that the prosecution expected to receive information from defense counsel that could impact the charges brought.

On May 10, 2001, the magistrate judge entered an order continuing proceedings until June 7, 2000, stating in the record that the extension was "at defendant's request." On May 15, 2000, the magistrate judge ruled on the United States' April 24th motion for extension of time to file formal charges, stating that the motion was granted in the interests of justice and "the premises considered." On May 23, 2000, the magistrate judge entered another order extending the period for filing formal charges to June 7, 2000, this time "on the agreement of the parties." On June 6, 2000, magistrate judge entered an order further extending the time to file formal charges to July 12, 2000, "in the interests of justice." On this occasion, however, the magistrate judge did not state his reasons for granting what must be viewed as an ends-of-justice continuance under 18 U.S.C. § 3161(h) (8) (A). Nor are there any other reasons discernable from the record, made either at the time of the order or later, that would support his finding that the interests of justice

would be satisfied by granting a continuance to July 12, 2000.

The United States eventually filed a two-count information on January 31, 2001, after subsequent ends-of-justice continuances were granted by the Court beginning on July 12, 2000. Each of these later continuances was granted either "at the request of counsel," the "request of the parties," or the "request of the defendant." The Court need not consider whether the continuances granted before June 6, 2000 and on or after July 12, 2000 properly excluded time from the thirty-day period for filing formal charges because the June 6, 2000 continuance is not supported by a statement in the record setting forth the reasons for granting a continuance to July 12, 2000 as required by 18 U.S.C. § 3161(h)(8)(A).

The Speedy Trial Act requires the Court to set forth "its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant." 18 U.S.C. § 3161(h)(8)(A). If no such statement is provided, then any delay occasioned by the continuance cannot be excluded from the time for filing formal charges. *See id.*; *see also Lattany*, 982 F.2d at 877. *Lattany* further explained that the trial court may state reasons either at the time of the order or later, as long as the ends-of-justice continuance itself is granted before the time expires:

The purpose of the requirement that reasons be stated is to insure careful consideration of the relevant factors by the trial court and to provide a reviewable record on appeal. Both purposes are served if the text of the order, taken together with more detailed subsequent statements, adequately explains the factual basis for the continuance under the relevant criteria.

Id. at 878 (internal quotations omitted).

Although there were no doubt reasons for extending the time on June 6, 2000, and although the magistrate judge specifically referred to the "interests of justice" in granting the continuance, there are no facts directly or inferentially discernable from the record to support the granting of this particular ends-of-justice continuance. Because the continuance was granted before the expiration of thirty nonexcludable days, the judge conceivably could have supplemented the record and stated the reasons he considered at the time of the continuance. See *id.* He has not done so, however, and a statement of reasons at this late date would be subject to challenge as a *post hoc rationalization*, especially since a motion to dismiss for lack of such a statement is pending. See *id.* at 880 (acknowledging the danger of *post hoc rationalization* after motion to dismiss has been filed). Without reasons previously stated somewhere in the record, I find that the June 6th continuance did not operate to exclude time under 18 U.S.C. § 3161(h)(8)(A). As a result, the information filed on January 31, 2001 was untimely filed and the

case must be dismissed. 18 U.S.C. § 3162(a)(1).

When determining whether to dismiss the information with or without prejudice, I consider the following factors:

1. The seriousness of the offense.
2. The facts and circumstances which led to the dismissal.
3. The impact on a reprosecution on the administration of the Speedy Trial Act and the administration of justice.

Id.; see *United States v. Taylor*, 487 U.S. 326, 333 (1988).

Considering these factors, the Court concludes that dismissal without prejudice is warranted. The defendant was charged in this case with carjacking, in violation of 18 U.S.C. § 2119, and possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). These are both very serious offenses. At the hearing, the defense counsel essentially conceded that the many delays in filing the formal charges were attributable to ongoing plea negotiations and his own hope that formal charges could be avoided and the matter resolved quietly. It was only when the case was transferred to a different prosecutor, who allegedly refused to cater to the defendant's sensitivities, that the previously cooperative (although somewhat mysterious) delays became the defendant's tool for dismissal. Finally, there is no evidence that reprosecution of the defendant would negatively impact the administration of the Speedy Trial Act and the administration of justice.

Accordingly, the information will be dismissed without prejudice.

United States v. Freeman
Crim. No. 2000-044
Memorandum
Page 7

An appropriate order follows.

ENTERED this 30th day of November, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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APPEARANCES :

Alphonso G. Andrews, Jr., Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Richard Hunter, Esq.
St. Croix, U.S.V.I.
For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the defendant's motion to dismiss the information as untimely filed under 18 U.S.C. §§ 3161(b) and 3162(a)(1) is **GRANTED**. The information filed in this case on January 31, 2001 is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 30th day of November, 2001.

FOR THE COURT:

United States v. Freeman
Crim. No. 2001-044
Order
page 2

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

Copies to:

Honorable Geoffrey W. Barnard

AUSA Hugh P. Mabe
Andrew Capdeville, Esq.

Mrs. Jackson
Jennifer N. Coffin